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CURRENT TOPICS.

Our esteemed contemporary, *The Albany Law Journal*, in a recent issue found fault with many of the courts who persist in referring to the State reports by the names of the reporters instead of by the name of the States. Its objection is good so far as it is confined to reports which are usually numbered by the name of the State, as most of the late reports are, and such old series as the Pennsylvania State reports. But in its criticism, it does not spare those judges who persist in referring to the Massachusetts reports of Pickering, Cushing, Metcalf, Gray and Allen, by the names of those reporters, instead of by the number of the reports, reckoning from the beginning of reporting the decisions of the Supreme Court of the State. We are at a loss to know whence those writers who persist in making trouble for investigators, derived their authority to refer to any report as "68 Mass." The law does not require it; very few, if any of the libraries have them so numbered, and the lawyers of the State and consequently the judges have never adopted the new system. There ought to be some understanding before writers assume authority to make a departure, and oblige men in haste to make it a mathematical problem as to where they are likely to find a given report.

Another thing that our contemporary does not like is the publication of "nasty" cases. We know of no reason why these cases if they decide a point of law, should not be furnished to the profession with all the fullness requisite to make the force of the decisions clear as of those upon any question. The fact that they have arisen is evidence of the likelihood of their continuing to arise. We hardly think that the profession has become so delicate "all of a sudden" that its mental equilibrium has been disturbed by this matter. Doubtless, our contemporary has had a vision, and an early crop of female lawyers may have been foretold, and this delicate matter suggested. But long discussions are objected to. It seems to forget that the "passive policy" and "*volenti non fit injuria*" decisions of our own and only "Sherwood, J.," are very short, and that in their brevity lies their wit. We are glad that our brother has been suddenly struck with the idea that judicial moral tastes should be elevated. The intimation that these sensational cases are too well relished by the judges will have some effect, if it is justified.

In regard to contingent fees, to which reference was made a short time since, some have the idea that to give the attorney a lien on the judgment that may be recovered, for his services (for a stipulated compensation) would be the most advisable method of ridding ourselves of this supposed instrument of perjury, bribery, etc, the contingent fee. We must confess an inability to perceive how this will accomplish the desired end. It is an indisputable fact that there is a large class of men who have meritorious claims against wealthy parties who by the negligence of themselves or of their servants have caused those men great damage. It is a fact that they are often without means, or likely to be without any on account of the expenditure of the little they may, by frugality, have saved, by the time the trial takes place. It is a fact that oftentimes it is a poor orphan child, or a helpless widow with a large family who has unsuccessfully appealed to the cold hearts of those who are doing business for the sake of making money, that makes his or her appeal to the courts of the State for redress. We have yet to hear that the legal profession exists for charitable objects, and lawyers who are able and should be encouraged to offer their services in the obtainment of justice for these litigants, are not likely to accept any retainer for a stipulated sum, when the payment of it is really contingent upon success and he may have a lien as security for its payment, upon whatever judgment he may recover. He knows of the chances of failure, and one is not disposed to show the same zeal for his client's interests, when, in case of success he gets only an ordinary fee. and in case of failure, gets nothing. It is the glare of the sum that he may earn that prompts him

to show zeal for his client's interests, and we think that zeal of itself is not objectionable. While we admit that there are dangers of the abuse of the system, such abuses are the incident of everything that is good, and the good that it does is perhaps greater than the evil that it may do.

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I.

SALES OF GOOD-WILL.

(*a*) *What included in.*—A sale of a good will far from operating a restraint on the business freedom of the vendor, is merely a transfer of what Judge Story describes[1] as "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities or even from ancient partialities or prejudices."

"When you are parting with the good will of a business," says Vice Chancellor Sir W. Page Wood,[2] "you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put it anything short of that. That the name is an important part of the good will of a business is obvious when we consider that there are at this moment large banking firms, and brewing firms, and others in this metropolis, which do not contain a single member of the individual name exposed in the firm." "It seems to be that species of connection in trade which induces customers to deal with a particular firm."[3] It is "the probability, that the old customers will resort to the old place."[4]

(*b*) *Sales by Professional Men.*—It has been denied that professional men, at least, lawyers, can make sale of their good will so as to restrict their freedom in the slightest degree[5] but when it is remembered that they may restrain themselves absolutely by contracts to relinquish practice within reasonable limits, it seems difficult to find reasons for sustaining any objection to the imposition of the narrower restraint. Whatever may be the objections, it is clear that such sales have long been recognized, and at this late day,

1 Story's Partnership sect. 99.

2 Churton v. Douglass, Johns. Ch. (Eng. 174, 1859); But a contract for the sale of "good will" will not be specifically enforced per Lord Eldon in Baxter v. Connolly, 1 Jac & W. 556, 580, (1820). See Senter v. Davis 38 Col. 450; Coslake v. Till, 1 Russ. Ch., 376, (1826); Ziegler v. Sentzner, 8 G. & J. (Md.) 150 (1836); s. c., 29 Am. Dec. 534.

3 Wedderburn v. Wedderburn, 22 Beav. 84, 104, (1856) per Lord Romilly, Master of the Rolls.

4 Per Lord Eldon in Crutwell v. Lye, 17 Ves. 346; Dougherty v. VanNostrand, 1 Hoff. Ch. (N. Y.) 68, 69 (1839). See Buckingham v. Waters, 14 Cal., 156, (1859). The Succession of Journe 21 La Ann, 391, (1869).

5 Lord Chelmsford once said: "But the term 'good will' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity, and ability to conduct their legal affairs. I can perfectly understand a solicitor agreeing to relinquish business in favor of another, and to use his best endeavors to recommend his client, and engage not to interfere with his successor, by a stipulation not to carry on business within a certain distance; but to sell the good will without anything more, and without arranging any price, would be an agreement incapable of being enforced by specific performance." Austen v. Boys, 4 Jur. N. S. 721, (1853). See Candler v. Candler, 2 Jac, 225, 231 (1821), per Lord Eldon.

it may be well to consider their lawfulness settled.[6]

(c) *Restraints on Vendor implied by Law.*—The authorities are conclusive that the sale of the good will of a business without more—does not imply a contract on the part of the vendor not to set up again in a similar business himself. He[7] and, *a fortiori*, his executor[8] is not precluded, from carrying on a precisely similar business with all the advantages he may be able to acquire from his own industry and labor, and from the regard people may have for him, and that in a place next door, for example, to the very place where he conducted his former place of business. If the purchaser wishes to prevent that step from being taken, it is his fault, if he does not take care to insert provisions to that effect in the deed. The vendor may carry on his business with his old customers;[9] he is entitled to publish any advertisement which he may see fit in the newspapers, stating that he is carrying on such new business, and to publish any circulars to all the world to say that he is conducting it[10]; but whether he may, by himself or by his chosen agents or travellers, personally solicit business from his old customers is a matter of doubt. Lords Romilly and Jessel assert that he cannot do so;[11] but

[6] In Bunn v. Guy, 4 East 190, (1803), the view stated in the text was followed. Hoyt v. Holley, 39 Conn. 326, (1872), holds (Park & Seymour, J. J., dissenting) that a physician may make sale of his practice. Warfield v. Booth, 33 Md. 63 (1870) assumes that he may do so. See Thomburg & Bevill, 1 Yo. & Coll, 553, (1842); Candler v. Candler, Jac. 225, 231, (1821), per Lord Eldon. In Whittaker v. Howe, 3 Beav., 383, 394, (1841), Lord Langdale said: "I confess there is something in all contracts of this nature of which I have entertained a doubt. Where clients rely on the professional skill and knowledge of the individual they have long employed, I have some doubt as to the policy of sanctioning the purchase of their recommendation of their clients to other persons. These doubts have not originated with myself, because I recollect very well their being long dwelt upon, and commented upon by Lord Eldon, not only in the case of a solicitor and client, but in the cases of medical men and their patients. I perfectly recollect a place in which the professional practice of one physician had been sold to another, wherein the policy of permitting such arrangements was the subject of great discussion and consideration. It is not, however, for me to act upon any doubts I may entertain of that nature, because agreements of this description have been too often sanctioned to be now questioned."

[7] Churton v. Douglass, Johns. Ch., (Eng.), 174, (1859), per Vice Chancellor Sir W. Page Wood (afterwards Lord Hatherley) Labouchere v. Dawson, L. R. 13 Eq. Cas. 322, 324, (1872) per Lord Romilly; Cook v. Collingridge, Jac., 607, cited in Collyer on Partnership 524, (Wood's American edition), Johnson v. Helleley, 34 Beav., 63, 65, (1864), per Lord Romilly; s. c. 2 De. G. J. & S. 446, Hall v. Barrows, 33 L. J. Ch. 204, (1864), per Lord Chancellor Westbury, Leggott v. Barrett, L. R. 15 Ch. Div. 306, 312, (1880), per Brett L. J., White v. Jones, 1 Abb., (N. Y.), Pr. (N. S.), 328, (1863) Moody v. Thomas, 1 Disney, (Ohio), 294 (1857), Rupp v. Over; 3 Brewst, (Pa.), 133.

[8] Davies v. Hodgson, 25 Beav. 177 (1858).

[9] Leggott v. Barrett, L. R. 15 Ch. Div. 306, (1880), overruling Ginesi v Cooper L. R., 14 Ch. Div. 596, (1880), per Lord Romilly.

[10] Per Lord Romilly in Labouchere v. Dawson, 13 Eq. Cas. 322, (1872). But see White v. Jones, 1 Abb. (N. Y.), Pr. (N. S.). 328, 338, (1863).

[11] Labouchere v. Dawson L. R., 13 Eq. Cas. 322, (1872); Ginesi v. Cooper L. R., 14 Ch. Div. 596, 599, (1880), acknowledged to be correct by Brett, L. J., in Leggott v. Barrett, L. R., 15 Div., 306, 313, (1880). The first direct of adjudication upon this point in the English courts is that of Lord Romilly in Labouchere v. Dawson, *supra* where he laid down the rule to be that the vendor "is entitled to publish any advertisement he pleases in the newspapers, stating he is carrying on" the new business; that "he is entitled to publish any circulars to all the world to say that he is carrying on such business; but he is not entitled either by private letter or by a visit or by his traveler or agent, to go to any person, who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm." "That is not a fair and reasonable thing to do after he has sold the good will," he continued, "customers it is true may be affected by public advertisements, and public circulars, but that does not in the slightest degree militate against the principle I have laid down. Then it is said, where are you to draw the line? Because this might happen, that a person might publish circulars in the papers, which circulars could have no meaning whatever, except as a solicitation to old customers of the old firm, and they would be unmeaning if they related to any new one. If such a question as that came before me exactly in those terms, I should hold it to be merely a colorable departure from what he was not to be allowed to do, that is, to send a circular to customers, of the old firm, requesting them as customers of the old firm, not to go on dealing with the person to whom he had sold the business, but to retain and employ him, who had conducted the old firm. That is the way I should look at it, and therefore to that extent I should grant the injunction; and I should say that the defendant to apply to any of the old customer privately, by letter, personally or by traveller, asking them to continue their custom with the defendant and not to go to the vendees. There I should stop, and I should test any other case by considering whether it was in those limits or not. That is the general way in which I should look at it." See Moody v. Thomas, 1 Disney, (Ohio), 294, 298, 299 (1857); Crutwell v. Lye, 17 Ves., 335, and Cook v. Collingridge, cited in Collyer on Partnership, 584, (Wood's Am. edition), decided by Lord Eldon are relied upon to sustain the opposite conclusion, but it is clear that the Lord Chancellor did not have this question directly before him. But in Genesi v. Cooper, L. R., 14 Ch. Div., 596, (1880), Jessel, M. R., supported Lord Romilly's decision, and in Leggott v. Barrett, L. R., 15 Ch. Div., 306, (1880), Brett, L. J., acknowledged its propriety, and in Walker v. Mottram, L. R., 19 Ch. Div., 355, 364, (1881), Bagalley, L. J., said for Lust and Lindley, L. J. J., that, "when a man sells his own business and good will for his own

the Court of Appeal have recently denied these decisions to be law and insists that the vendor may solicit the business of his old customers, so long as he does not represent himself as connected with or having succeeded to the old business.[12] However it may be, it seems clear that Lord Romilly's rule should not be extended to a case of involuntary or compulsory alienation of good will, as *e.g.*, by a bankrupt, and, in such case, the debtor should be permitted to see his old customers;[13] nor where it is expressly provided that the sale shall not be construed as restraining the vendor in his freedom to transact the same business.[14] Even the announcement that by the generosity of his friends, he has been re-instated in his old business is no violation of legal duty.[15] It seems hardly necessary to say that a vendor of goodwill is not prevented from leasing other property he may own in the neighborhood to another person who may carry on the same business, provided there is no collusion and the lessor has no interest in the business.[16]

(*d*). *Deceit or Fraud Forbidden.* While the vendor of good-will in nowise precludes himself from engaging in a similar business, as we have seen, even to the injury of his vendee,[17] there yet rests upon him an obligation to abstain from the use of any active means, which is calculated to directly draw away the customers of the place where the

benefit, it is thought unfair on his part to avail himself of his personal acquaintance with his old customers, and to induce them to withdraw their support from the business he has sold, and this element of personal unfairness may be sufficient to justify the decision in Labouchere v. Dawson;" but speaking for himself he showed considerable doubt in the same direction. Burkhardt v. Burkhardt, referred to in 14 Am. Law Register, 334, is said to support Labouchere v. Dawson, *supra*. See Hockham v. Pottage, L. R., 8 Ch , 91, in Leggott v. Barrett, L. R., 15 Ch., Div. 366, (1880), Brett, L. J., showed considerable disinclination to dissgree with Lord Romilly, but intimated a strong doubt of the correctness of his decision.

12 Pearson v. Pearson, 50 L. T. N. S., (1884); 16 Chic. L. N. 400. The case could have been decided upon another satisfactory point if necessary, viz.: that the sale expressly reserved the rights of the vendor to resume the same business, but the court did not shrink from the opportunity to declare Labouchere v. Dawson, *supra*, to be wrongly decided. Bagallay, L. J., said with respect to Labouchere v. Dawson, he had on a former occasion, in Walker v. Mottram, 19 Ch. Div. 355, 366, expressed his doubts as to the correctness of that decision, and he did not think that it should be recognized as a binding authority. He was well aware that it had been followed on two or three occasions by judges of co-ordinate jurisdiction, but it had never been distinctly either followed or disapproved in the Court of Appeal. The general law had been very distinctly enunciated by the late Lord Hatherly, when vice-chancellor, in Churton v. Douglas, John. 174, to the effect that a man who has sold the good-will of his business is not thereby prevented, if he thinks fit, from carrying on business with the customers of the old firm, provided that he does not represent that his is the old business or that he is the successor in business of the old firm: In Leggott v. Barrett, 15 Ch. Div. 306, the Court of Appeal, reversing a decision of Sir George Jessel, M. R., held that the injunction should not be extended to restrain actual dealing with customers of the old firm who chose to come to the defendant of their own free will, though any solicitation of their custom would be restrained. In Walker v. Mottram, 19 Ch. Div. 355, the matter again came before the Court of Appeal, and it was held that Labouchere v. Dawson could not be extended to the case of compulsory alienation—*e. g.*, when the assignees of a bankrupt sold his business and good-will, and that the decision in that case went far beyond the cases relating to good-will decided before 1872. Referring to his own observations on Labouchere v. Dawson, in Walker v. Mottram, and the desire which he then expressed, should that decision ever be questioned or brought forward in a case in which it would be essential to determine the point, of having an opportunity of fully considering whether he should concur in it or not, that opportunity seemed to have here arisen; and, still holding the same view, he did not think that Labouchere v. Dawson, which was beyond several of the previous decisions, was correctly decided. If the case rested on the sale only, he could not follow Labouchere v. Dawson, and should hold that there was no ground for restraining the defendant.

Instead of protecting himself behind the clause reserving to the vendor the right to transact business, he preferred to rest his decisions on clause 1 only, giving full effect to his opinion that Labouchere v. Dawson was wrongly decided. Cotton, L. J., concurred, and was also of opinion that the decision in Labouchere v. Dawson was wrong, having regard to the previous decisions of Lord Eldon (to which his lordship referred). If a man after selling his goodwill and business might set up in the same business and say, without any deception, that he was a member of the old firm, was not this an invitation to customers of the old firm to come and deal with him? He could not see where the line was to be drawn. If the vendor might advertise publicly, why might he not solicit business from the old customers by private letters? Lindley L. J., said that in his opinion Labouchere v. Dawson was rightly decided. It extended the doctrine of the older cases; but he could not say that he thought the principle—which was that a man shall not derogate from his own grant—was wrong. If the courts had extended the principle still further, and said that a man who had sold his business and good-will should not be allowed to start a rival business in opposition to his purchaser, it would, he thought, have been right, but the courts had not done so. But be this as it might upon the true construction of this agreement, Labouchere v. Dawson, whether rightly or wrongly decided, did not, in his opinion, apply.

13 Walker v. Mottram, L. R. 19 Ch. Div. 596 (1880).

14 Pearson v. Pearson, Eng. Ct. App., 50 L. T. N. S. (1884) 16 Chic. L. N. 400.

15 Curtweil v. Lye, 17 Ves. 334 (1810) per Lord Eldon.

16 Bradford v. Peckham, 9 R. I. 250 (1869).

17 Shackle v. Baker, 14 Ves. 468 (1808) per Lord Eldon.

old business was done. In other words, he must make no representation to the public which might lead them to the conclusion that he is continuing, or has succeeded to the business of the old firm. He must set up the business established by him in opposition to that sold by him, as a separate concern, and not as the old established one, which he has sold.[18] He must not announce or advertise that he has "removed his former business" to the new location.[19] If he sell the good-will of a hotel, he must not open a new one under his former hotel name, or under any name, or in any manner on the same premises, or in any way lead ordinary people to believe that he is carrying on business in continuation of the business formerly carried on by him.[20] When a store is the subject of sale, he must not open a new one close to the old one made to resemble the former.[21] He may use his own name of course, when he formerly did business in the name of his firm, but if a retiring partner, makes sale of his interest in the goodwill of the firm, to his former partners, he has no right to resume business under the name of the old firm, though that name merely represents himself and company, however truthful the representation of the establishment of the new firm may be, especially when he openly solicits business from his old customers, on the strength of their past patronage, and the other alleged partners make the same appeal, on the strength of the confidence they "had so long enjoyed" while representing the other firm.[22]

(e). Use of Vendor's Name. The sale of good-will does not, however, transfer to the vendee any right to use the name of the vendor,[23] but it does justify him in advancing his own interests by referring to himself as the "successor to" his vendor, or as "late Honest Dealer & Co.," for example.[24]

(f). Sale need not be Express. A sale of good-will need not be express, but may be implied from the nature of a transaction between the parties. So when one who has been a partner in firm, assigns his share, and is paid for it, as it stands on the partnership books, he sells his share "as in a going concern," and is in a very different position from that which he would have occupied upon a mere dissolution of the partnership in the ordinary manner where the affairs of the whole concern would have to be wound up, and he would only get what it would produce. Some debts would then be thrown out as bad. It is very rarely the case that when accounts are taken in that manner, some debts are not thrown out as bad; but it is well known that when a partnership is dissolved, the number of debts so thrown out is considerably greater than the number thrown out in the current course of business. He obtains, therefore, the benefit of his share in the business "as a going concern," and in that view it seems reasonable that a sale under such circumstances should imply the sale of the good-will.[26]

(g). "Good-will" not Necessarily Local. It has been asserted that a sale of good-will carries with it no more than the advantage of occupying the premises which were occupied by the vendor and "the chance you thereby have of the customers" of the vendor "being attracted to those premises." But Vice-Chancellor Sir W. Page Wood well describes the true condition of the law when he says: "'Good-will,' I apprehend must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on,

[18] Churton v. Douglass, Johns. Ch. (Eng.) 174 (1859); per Vice-Chancellor Sir W. Page Wood, (afterwards Lord Hatherly); Snowden v. Noah, 1 Hopk. Ch. (N. Y.) 347 (1825); s. c. 14 Am. Dec. 547, where the publication of a newspaper of similar name was enjoined, Hogg v. Kirby, 8 Ves. 214.

[19] Hall's Appeal, 68 Pa. St. 459 (1869), citing Hogg v. Kirby, 8 Ves. 214; Churton v. Douglass, Johns. (Eng. Ch.) 174 (1859).

[20] Mossop v. Mason 18 Gr. Ch. (Ont.) 453 (1871) s. c., 17 Id. 360 (1870) s. c. 16 Id. 302 (1869).

[21] 51 Dethlip v. Tamsen, 7 Daly (N. Y.) 354.

[22] Churton v. Douglass, Johns. Ch. (Eng) 174, (1859) per Vice Chancellor Sir W. Page Wood; White v. Jones, 1 Abb. (N. Y.) Pr. (N. S.) 328 (1863).

[23] *Ibid*, Reeves v. Deincke, 12 Abb. (N. Y.) Pr. (N. S.) 92 (1871); compare Adams v. Adams, 7 Abb. (N. Y.) N. Cas. 292.

[24] Churton v. Douglass, *supra*; compare Reeves v. Deincke, *supra*; see Weed v. Peterson, 12 Abb. (N. Y.) Pr. (N. S.) 178 (1871).

[25] Per Vice Chancellor Sir W. Page Wood in Churton v. Douglass, Johns. Ch. (Eng.) 172, 186 (1859).

[26] Churton v. Douglass, Johns. Ch. (Eng.) 174, 188, (1859); explaining remarks of Lord Eldon in Kennedy v. Lee 3 Mer. 452 (1817); compare Mussels Appeal, 62 Pa. St. 81 (1869).

or with the name of the late firm, or with any other matter carrying with it the benefit of the business * * *. It would be absurd to say that where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other or in Fleet street, or in the Strand or at any place adjoining, and that they regard that, and do not regard the identity of the house of business—namely, the firm."[27]

(*h*) *But may Run with the Land.*—The good will of a business done in a house, however, may be nothing more than an advantage attached to the possession of the house. It therefore passes by a mortgage of the house.[28] So where a lease of a house, with the good will of a business established in it were sold in a creditor's suit with the consent of a person with whom the lease had been deposited as a security and brought a price less than the amount of his debt, the equitable mortgagee was held entitled to the whole of the purchase money, whether arising from the value of the good will or from the value of the premises independently thereof.[29] So, where a husband who has kept a tavern in his wife's house died, it was held that no claim upon her for the value of the good will established by her husband could be made upon her.[30]

(*i*) *Transferability.*—"Good-will" is a proper subject for sale,[31] or bequest,[32] and passes to the owner's assignee in bankruptcy.[33]

(*j*) *Remedy for Violation.*—Equity will always entertain a bill which seeks an injunction for violation of those duties which rest upon vendors of good will or others towards the owners thereof.[34]

II.

GOOD-WILL OF PARTNERSHIPS.

(*a*). *Partnership Assets.* (1). *General Doctrine.* The "good-will" of a firm *i. e.*, its reputation or connection with its customers, is a portion of its assets, and when dissolved is to be valued as such, and when such dissolution is caused by the death of one partner, it forms a portion of the subject matter producing profits, which constitute partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner according to their shares in the concern,[35] except when the partnership articles expressly provide, that at the death of any one of the partners, the survivors shall be entitled to the good-will of the firm.[36]

[27] Ex parte Parmett; In re Kitchin, L. R., 16 Ch., Div. 226, (1880).

[28] Chissum v. Dewes, 5 Russ. Ch., 27, (1828).

[29] Elliott's Appeal, 60 Pa. St., (10 P. F. Sm.) 161, (1869), S. P., Morris v. Moss, 25, L. J., N. S., 194, (18). See England v. Downs, 6 Beav. 269.

[30] Buckingham v. Waters, 14 Cal. 146, (1859); Consequently deceit in the sale of it will be good ground for action for deceit; Cruess v. Fessler, 39 Cal. 336, (1870).

[31] Hitchcock v. Coker, 6 A. & E., 438, (1837). But compare Robertson v. Quiddington. 28 Beav., 529, (1860), where the court seems to have a leaning in the opposite direction. It decided that the bill of a legatee of two thirds of the share of the good will of the testator in a partnership against the surviving partner and the legatee of the other third was demurrable for that the executors had not been joined, they having the right to sell the share of the testator in the property of the firm, together with the good will, and thus the legacy might be worthless. The dicta of the court seem not to be sound, for if the heirs of a deceased partner can take the good will by distribution, it seems strange that they cannot take it by devise.

[32] Ex parte Thomas, 2 Mont. D. & De. G., 294, (1841), Crutwell v. Lye, 17 Ves., 304. (1810).

[33] Partridge v. Mench, 2 Barb. Ch., (N. Y.), 101; Barber v. Connecticut Mutual Life Ins. Co., 15 Fed. Rep.. 312, (1883).

[34] Dougherty v. Van Nostrand, 1 Hoff. Ch. (N. Y.) 68, 69 (1839); Wedderburn v. Wedderburn, 22 Beav. 84, 104, (1856); per Lord Romilly, Master of the Rolls; Crawshay v. Collins, 2 Russ. 344, per Lord Eldon; s. c. 1 Jac. & W. 266 (1820); Dougherty v. Van Nostrand, 1 Hoff. Ch. (N. Y.) 68, 70, (1839); Giblett v. Read, 9 Mod. 460; Howe v. Searing, 19 How. Pr. 14, 17, (1860) per Hoffman, J.; 2 Bell's Com. 645; McDonald v. Richardson, 1 Giffard, 81; Johnson v. Helleley 34 Beav. 63(1864)s. c. 2 De. G. J. & S. 446; Hall v. Barrows 33 L. J. Ch. 204, (1864); Case v. Abeel, 1 Paige Ch. (N. Y.) 393, 401 (1829), per Chancellor Walworth; Davis v. Hodgson, 25 Beav. 177 (1858); Holden v. McMakin, 1 Pars. Sel. Eq. Cas. 270, 277, (1847); Smith v. Everett, 27 Beav. 446 (1859); Cook v. Collingridge, Jac. 607; 27 Beav. 456 (1823); Sheppard v. Boggs, 9 Neb. 258 (1879); s. c. 2 N. W. Rep. 370; Fenn v. Boltes, 7 Abb. Pr. (N. Y.) 202 (1858); Bininger v. Clark, 10 Abb. Pr. (N. S.) 264 (1870); Rammelsburg v. Mitchell, 29 Ohio St. 22, 54 (1875); Austen v. Boys, 4 Jur. N. S. 221 (1853); 2 DeG. & J. 626; Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510 (1859); see Wilson v. Greenwood, 1 Swanst. 471; Knott v. Morgan, 2 Keen 213; Motley v. Downman, 3 Myl. & Cr. 1; Snowden v. Noah Hopk. 347; Bell v. Locke, 8 Paige (N. Y.) 175; Pearce v. Chamberlain, 2 Vesey, Sr. 33 (1750); Lyster v. Dolland, 1 Ves. Jr. 431, 434, 435 (1792) Jackson v. Jackson, 9 Ves. 591, 597 (1804); McFarland v. Stewart, 2 Watts (Pa.) 111 (1833); Hine v. Hart, 10 Jur. 106; compare Musselman's Appeal, 62 Pa. St. 81 (1869); Staats v. Howlett, 4 Denio (N. Y.) 559, 566, (1847); Van Dyke v. Jackson, 1 E. D. Sm. (N. Y.) 419 (1852); Spann v. Nance, 32 Ala. (N. S,) 527 (1859).

[35] Wedderburn v. Wedderburn, *supra*.

[36] Hammond v. Douglass, 5 Vesey 539 (1800). This case was doubted to be law in Crawshay v. Collins 15

(2). *Adverse Opinion.* Another set of cases would establish the contrary doctrine, *i. e.*, that without special articles evincing a different intent, "the good-will survives, and a sale of it can not be compelled by the representatives of the deceased partner being the right of the survivor, which the law gives him to carry on the trade, it is not partnership stock of which the executor may compel a division." This is the opinion, among others, of an authority of no less respectability than Lord Loughborough.[37] But the former doctrine is the prevailing one, having both the great weight of authority and the weight of reason in its favor.

(3). *Are professional Partnerships Within the Doctrine?* It is a matter of very great doubt however, whether professional partnerships come within the operation of the rule stated in the preceding paragraph. Sir John Leach denies that they do, because they are "very different from commercial partnerships." "When such partnerships determine, unless there be stipulations to the contrary," says he, "each must be at liberty to continue his own exertions, and where the determination is by the death of one, the right of the survivor cannot be affected."[38] The decision has been explained away to the satisfaction of some by the claim that the partnership articles had omitted to state anything with regard to the disposition of the good-will,[39] but those who do so, can not discern that they are themselves unconsciously creating the very distinction which they seek to destroy, in another, but equally important particular.

(4) *Extent of General Doctrine.*—The doctrine that "good will" is partnership assets, has been carried so far that where two parties had built up quite a business in conducting an insane hospital and immigrant lazeretto, had controversies in consequence of which cross-bills were brought, and an agreement could not be made as to who should continue the establishment, a receiver was appointed and a sale ordered of the good will, and the parties restrained from conducting the same business directly or indirectly in the city where the business had been carried on.[40]

(5) *Its Effect upon the Action of the Survivors.*—The effect of the doctrine generally recognized is of course to prevent the survivor or survivors from using the name of the old firm,[41] or referring to the old firm as successor thereto.[42]

(*b*) *Valuation of the "good will."* (1) *Generally* —The representatives of the deceased have a right to have such "good will" sold for the best price obtainable, and the surviving partner will be enjoined from taking advantage of any of the "good will" earned by the late firm, though no restraint will be placed on his liberty to build up a new business on his own merits. He may, of course, participate in the bidding, but he occupies no better position than any stranger.[43] What the good will would have produced at the proper period of time and sold in the most advantageous manner, is the proper standard of value.[44]

(2) *Elements Diminishing Value.*—But while the good will is to be considered as an element in the valuation of the share of the deceased partner, it is to be valued upon this principle, that the surviving partner shall not

Ves. 277 (1808) by Lord Eldon; Doughterty v. Van-Nostrand, 1 Hoff. Ch. (N. Y.) 68, 70, (1839); but re-asserted to be law by Vice Chancellor Shadwell, in Lewis v. Langdon, 7 Sim. 421 (1835); and in Fair v. Pierce, 3 Maddock, 47, 49, (1818); Sir John Leach, Vice Chancellor, asserted it to be the law with reference to professional partnerships, admitting them to be "very different from commercial partnerships" by implication conceding as to commercial partnerships, Hammond v. Douglass not to be law. See Story Part secs. 343, 349, and note, Collyer Partnership, (2 Am. Ed.) 177; Willet v. Blandford, 1 Hare. 253 (1841) per Vice-Chancellor Wigram; Robertson v. Quiddington, 28 Beav. 529, 536 (1860).

37 Farr v. Pearce, 3 Madd. 47, 49, (1818).

38 See 14 Am. Law. Reg. N. S. 10, article of Arthur Biddle, Esq.

39 Wilson v. Wilson; Willson v. Williams, 4 Sandf. Ch. (N. Y.) 379 (1846); S. P. Turner v. Major, 3 Giff. 442 (1862). See Martin v. Van Shack, 4 Paige (N.Y.) Ch. 479 (1834). The power of the court to restrain either of the partners from doing business which might interfere with the prosperity of the vendee, is perhaps a matter of doubt in New York, where the principal case was decided since Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510 (1859), where it was held that a member of a dissolved firm was not to be restrained from doing a like business.

40 Bowman v. Floyd, 3 Allen (Mass.) 76 (1861); Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 202 (1858); McGowan etc. Co. v. McGowan, 22 Ohio St. 370 (1872); see, seemingly, *contra*, Staats v. Howlett, 4 Denio (N. Y.) 559, 566, (1847); see Scott v. Rowland, 26 L. T. N. S. 391.

41 Bininger v. Clark, 10 Abb. Pr. (N. S.) 264 (1870).

42 Bradbury v. Dickens, 27 Beav. 53 (1859); Holden v. McMakin, 1 Pars. Eq. Cas. 271 (1847).

43 Mellersh v. Kee, 24 Beav. 453 (1860), where the good-will of a banking firm's business was held to be one year's net profits.

44 Per Lord Chancellor Westbury in Hall v. Barrows, 33 L. J. Ch. 204, 208, (1864); Rammelsburg v. Mitchell, 29 Ohio St. 23, 55 (1875).

be restrained from setting up the same description of business should he decline to become the purchaser,[45] for it is his right to carry on the same business though he may therein acquire all the custom of the old firm.[46] This right is recipocral, however, the executor of the deceased having the right to carry on the same business in the decedent's name.[47]

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[45] Per Lord Romilly in Daviess v. Hodgson, 25 Beav. 177, 183 (1858); Smith v. Everett, 27 Beav. 446 (1825).
[46] Webster v. Webster, 3 Swanst. 490.

PREFERENCES BY DIRECTORS IN THEIR OWN FAVOR.

It may be well to add to the excellent article of Mr. Joyce a short discussion upon the subject mentioned especially as the Court of Appeals of Virginia has lately had it before it for decision.[1]

That the directors of a corporation are bound to act in discharge of their duties with prudence, vigilance and fidelity, and to apply its assets, in the event of insolvency, for the benefit of the creditors in preference to the claims of stockholders or other persons, is a proposition which cannot be disputed. But that they are technically trustees for the creditors and bound to apply the assets ratably among the general creditors, is a proposition which is in conflict with the great weight of authority. In Sawyer v. Hoag[2] the well established principle was asserted that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors, which cannot be withdrawn from their reach by any act or device on the part of the directors; but the court recognized a distinction between the capital stock of a corporation and its ordinary assets, with which, it was said, the directors may deal as they choose.

It is not only settled that the directors may make preferences between creditors, but such preferences may be made in their own favor when they themselves are creditors of the corporation.[3] Of course in such cases they must act with the utmost good faith, and the transaction to be upheld must be free from the taint of fraud or suspicion. This was distinctly held in the well considered case of Buell v. Buckingham.[4] There the controversy was between the judgment creditor of an insolvent corporation and one of its directors. An execution in favor of the former was levied on certain property which the latter claimed by purchase in discharge of a debt due him by the company. The property was sold and conveyed to him pursuant to an order made by the directors, at a meeting at which he was present and voted, his presence being necessary to make a quorum for business. The transaction was assailed by the judgment creditor as illegal and void; but it was held to be valid. Judge Dillon in his opinion said: "Being an officer in the corporation did not deprive him [the purchaser] of the right to enter into competition with other creditors and run a race of diligence with them, availing himself in the contest of his superior knowledge and of the advantages of his position to obtain security for, or payment of, his debt. He has an advantage, it is true, but it is one which results from his position, and which is known to every person who deals with and extends credit to a corporation. This is one of the causes which has operated to bring corporate companys into discredit, and may constitute a good legislative reason for giving priority to outside creditors, but the legislature must furnish the remedy."

The same doctrine was laid down in Whitwell v. Warner,[5] where a preference by a corporation in favor of one of its stockholders was upheld against the claims of creditors. The court said: "As to constructive fraud, it is not competent certainly to predicate this of the mere fact of a stockholder's availing himself of his superior advantages to obtain security for debts due to himself, to the exclusion of other creditors. The stockholder and the stranger, who are both creditors of the corporation, no doubt stand in very unequal positions. But it is an inequality which the law allows, and which is understood by those who contract with corporations."

[1] Planters' Bank v. Whittle, 8 Va., L. J. 597, from which this article is taken.
[2] 17 Wall, 610.
[3] Planter's Bank v. Whittle, *supra*.
[4] 16 Iowa, 284.
[5] 20 Vt. 425.

In Gordon v. Preston,[6] a mortgage by a corporation was held good which was assailed by creditors, on the ground, among others, that it was in favor of the President and Treasurer of the company, and who were present at the meeting of the directors when the mortgage was authorized and executed, Gibson, Ch. J. delivering the opinion of the court, holding: "That a corporator may sustain the relation of debtor or creditor in regard to the corporation, and in the latter receive a security, is a proposition which requires not the aid of an argument, and here the existence of a meritorious debt is not disputed."

In Ashurst's Appeal,[7] Judge Strong for the court said: "There must be many things which directors can do for their individual benefit which are binding upon a corporation of which they are directors. If they have advanced money, I can not doubt they may pay themselves with corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And though ordinarily the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void; they are carefully watched, and their fairness must be shown."

In R. Co. v. Claghorn,[8] the directors of a corporation who had endorsed certain notes for the company, voted a mortgage on its property for their indemnity, which was held to be valid. The court said: "There is nothing either in law or equity which forbids a member, or even a director of a corporation from contracting with it, and like any other individual, he has a right to prescribe his own terms, which the corporation are at liberty to accept or reject, and when the contract is concluded, he stands in the same relation to the other creditors of the corporation as any other individual would under the same circumstances. When the question of priority arises, it must depend on the *bona fides* of the transaction, fraud or no fraud. And if by greater diligence, and without fraud, he has fairly gained an advantage over the other creditors, he is entitled to retain it."[9]

[6] 1 Watts, 385.
[7] 60 Penn. St. 290.
[8] 1 Spear's Eq. 545.

[9] See also Smith v. Skeary, 47 Conn. 47; Catlin v. The Bank, 6 Id. 233; Sargent v. Webster, 13 Metc. 497; Field on Corporations, sec. 177.

CONSTITUTIONAL LAW — INTER-STATE COMMERCE—SLEEPING CAR COMPANY —PRIVILEGE TAX.

PULLMAN SOUTHERN CAR CO. v. NOLAN. SAME v. MONTGOMERY CO. STATE v. PULLMAN SOUTHERN CAR CO.

United States Circuit Court, M. D. Tennessee, October Term, 1884.

A State law declaring the business of running sleeping cars, when not owned by the railroads on which they are run, a privilege, and providing for a privilege tax on every car used in the State, and for its collection by distress warrant, is so far as it attempts to collect a tax upon cars not used exclusively within the State, a regulation of inter-state commerce, and therefore unconstitutional.

In Equity.

A. L. Lacheam and *Ed. Baxter*, for the company; *W. A. Quarles* and *Dodd & Lanier*, for the counties; *T. E. Matthews*, *Champion & Head*, for the State.

MATTHEWS, Circuit Justice, delivered the opinion of the court:

The first of these cases is an action at law to recover back an amount alleged to have been illegally exacted as taxes, a statute of the State authorizing such a suit, and the plaintiff being a citizen of Kentucky. It is submitted for decision upon a general demurrer to the declaration.

The second is a bill in equity, the object of which is to perpetually enjoin the defendants, the counties of Montgomery, Stewart, Houston, Robertson, Sumner and Davidson, from collecting taxes, which they assert the right to collect, of the same description as those involved in the action against the comptroller.

The third suit is a bill in equity filed by the State of Tennessee, seeking to compel a discovery from the defendants, of the number of cars used by it, claimed to be subject to the tax in question, and to recover and collect the amount of the tax due them. This suit was commenced in the Chancery Court of Davidson county, but was removed into this court, on the application of defendant.

All three involve and depend upon a single question.

The Constitution of Tennessee provides (sec. 28) that:

"All property, real, personal and mixed, shall be taxed, but the Legislature may except such as may be held by the State, counties, cities or towns, and used exclusively for public or corporate purposes, and

such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and except one thousand dollars worth of personal property in the hands of each tax-payer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

That Constitution also provides (art. 2, sec. 29) that—

"The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to State Taxation."

On March 16, 1877, the General Assembly of Tennessee passed an act entitled:

"An Act declaring the mode and manner of valueing the property of telegraph companies for taxation, and of taxing sleeping cars"—

the sixth section of which is as follows:

"The running and using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads on which they are run or used, is declared to be a privilege, and the companies owning and running or using said cars or coaches, are required to report on or before the first day of May, each year, to the comptroller, the number of cars so used by them in this State, and they shall be required to pay to the comptroller by the first day of July following, fifty dollars for each and every one of said cars or coaches used or so run over said road, and if the said privilege tax herein assessed be not paid aforesaid, the comptroller shall enforce the collection of the same by distress warrant."

The Pullman Southern Car Company is a corporation created by the laws of Kentucky, with its principal office and place of business in Louisville, in that State. It manufactures sleeping cars and drawing room coaches, and furnishes them to railroads under contracts for that purpose, retaining the ownership and receiving compensation by the sale of tickets to passengers desiring such accommodations. It has such arrangements with various railroad companies in Tennessee, on and over whose roads its cars are run and used, in carrying passengers into the State from points out of it, and out of the State from points within it, and across the State between points in other States, as well as between points wholly within it.

Only two such cars are used exclusively for carrying passengers between points wholly within the State, and as to them no question is made. In respect to all others it is claimed that tax is invalid as a regulation of inter-state commerce, the exclusive right to regulate which is expressly confided by the Constitution to the Congress of the United States.

The tax, it is not denied, is what is known to the Constitution and laws of Tennessee as a privilege tax. It is not a property tax, for by the terms of the State Constitution, that must be based on value; whereas this is an arbitrary charge fixed by the Legislature itself, without regard to the actual or comparative value of the article which is the basis of the tax.

A reference to repeated decisions of the Supreme Court of Tennessee leaves no room to doubt what constitutes a "privilege," as a subject of taxation under the constitution and laws of that State.

"The first Legislature after the formation of the Constitution," said the court in French v. Baker, 4 Sneed, 193, "acted upon the idea that any occupation which was not open to every citizen, but could only be exercised by a license from some constitutional authority, was a privilege. And it is presumed this is a correct definition of the term." In Mayor of Columbia v. Guest, 3 Head, 314, the keeping of a livery stable was held not to be a privilege, because the Legislature had not so declared it. "A privilege," said the court in Jenkins v. Ewing, 8 Heisk. 456, "is the exercise of an occupation or business which requires a license from some proper authority designated by some general law, and not free to all or any without such license."

"There is a clear distinction recognized," says the Supreme Court of Georgia in Home Insurance Co. v. Augusta, 50 Ga. 530, "between a license granted or required as a condition precedent, before a certain thing can be done, and a taxed assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act, which without such authority would be illegal. A tax is a rate or sum of money assessed upon the person, property, business or occupation of the citizen." And this principle, it is said by the counsel for the State in argument, has been repeatedly recognized by the Supreme Court of Tennessee as early as in 1839, in the case of Robinson v. Mayor of Franklin, 1 Hump. 156. And in Mayor of Columbia v. Beasley, 1 Hump. 232, the court says: "The Legislature may tax privileges in what proportion they choose, and so may municipal corporations, provided the inequality is not such as to make it oppressive upon a particular class of the community."

It results, therefore, that in Tennessee the Legislature may declare the right to carry on any business or occupation, to be a privilege, to be purchased from the State upon such conditions only as the law may prescribe, to engage in and pursue which, without compliance therewith, is illegal. In the present case, "the running of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege." The condition upon which it may obtained or exercised, is the payment of an annual tax of seventy-five dollars for every car so run and used. If that condition is not complied with, such running

and using of sleeping-cars or coaches is forbidden and is unlawful. The right to attach this condition involves the right to attach any other the Legislature may see fit to adopt, and the question of the right to impose this tax as a condition of the exercise of the privilege resolves itself into the broader question of the right to prohibit it altogether, for that which the Legislature may license it may forbid; and it is forbidden unless it be licensed. The question thus reduced, becomes one not of the limitations of the taxing power of the State, but upon its power to declare the business of the company as carried on, upon and across its territory, a privilege, or forbid it altogether. "Beyond question," said Mr. Justice Clifford, delivering the opinion of the court in Transportation Co. v. Wheeling, 92 U. S, 273-279, "these authorities show that all subjects over which the sovereigh power of the States extends, are objects of taxation, the rule being that the sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission, except those means which are employed by Congress to carry into execution, the powers given by the people to the Federal Government, whose laws made in pursuance of the Constitution are supreme." And according to the decision in Crandall v. Nevada, 6 Wall. 35, the power of the State, whether exerted in form of taxation or otherwise, is still further limited, so as not to deny or impair any rights belonging to citizens of the United States as such, by virtue of the Constitution, as in that case the right of the people to pass and repass into, through, and out of any State, without interruption. In that case Mr. Justice Miller, delivering the opinion of the court, after commenting on the case of McCullough v. Maryland, 4 Dal. 46, "it will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character; so in the case before us, it may be said that a tax of one dollar for passing through the State of Nevada, by stage-coach or railroad, can not possibly affect any function of the Government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."

In the case of State Freight Tax, 15 Wall. 232-280, it was distinctly declared that the transportation of passengers or merchandise through a State, or from one State to another, was a subject of the exclusive jurisdiction of Congress, and that a State could not directly tax persons or property passing through it, or tax them indirectly by levying a tax upon the transportation. And in Almy v. State of California, 24 How. 169, as explained in Woodruff v. Parham, 8 Wall. 123-138, it was decided that a stamp tax imposed by State authority, upon bills of lading for the transportation of gold and silver from any point within the State to any point without the State, was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that precedence of transit of goods and persons between one State and another, which is within the rule laid down in Crandall v. Nevada, 6 Wall. 35, and within the authority of Congress to regulate commerce between the States." If a tax upon the person or thing carried is a regulation of commerce forbidden to the State, it seems impossible to escape the conclusion that a tax imposed as the price of the privilege of being carried, is equally such a regulation. It is immaterial whether the privilege granted or withheld, is attributed to the carrier, or to that which he is engaged in carrying. In both cases it is a burden upon the act of transportation, and a tribute levied directly upon commerce itself. In the language of Mr. Justice Story, delivering the opinion of the court, in the case of the State Freight Tax, 15 Wall. 232-281, "inter-state transportation of passengers is beyond the State Legislature. * * * "We regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation."

The case is to be distinguished from that of Osborne v. Mobile, 16 Wall. 469, when the subject of the tax was not the act of transportation itself, but a general business carried on within the State by a resident citizen thereof, which included the making of contracts for transportation beyond the limits of the State.

Nor is it within the decision in the case of Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, where the point ruled was that the levying of a tax upon vessels on other water-craft, or the exaction of a license fee by the State within which the property subject to the taxation has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States, although the property is employed in foreign or inter-state commerce.

In the present case the Pullman Southern Car Co., a corporation of Kentucky, has no domicile in Tennessee, and is not personally subject to its jurisdiction for purposes of taxation, and sleeping-cars which it runs and uses upon the railroads of that State, in the transportation of passengers into and from it, from and into other States has no *situs* within that State, for purposes of taxation. They are not brought into the State for purpose of being employed in a business carried on within it, and do not become a part of the mass of property within the jurisdiction of the State for purposes of taxation. They are in the State only as passing to and from it, while in the act of transportation, performed by virtue of a right secured to the owners of them, not by the authority of the laws of Tennessee, but by virtue of a right secured by

the exclusive jurisdiction of Congress under the Constitution.

It has been suggested that the sleeping-cars do not really perform any office in the act of transportation, but may be likened rather to hotels or inns on wheels, and like other hotels or inns, subject to regulation and license by the State. But the refinement is too subtle to be sound. Even regarded as such, hotels or inns on wheels, propelled by steam power over railroad tracks, receiving and delivering travellers at points widely separated in distances, would probably be considered still as vehicles of transportation, and their use in that way would be commerce.

The conclusions reached from these considerations are, that a tax upon the running and using of sleeping-cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used as a privilege, is equivalent to a concession that the State may regulate it in all other respects, or forbid it altogether; that consequently it is a regulation of commerce among the States, when applied to such cars employed in inter-state transportation; and in that application, contrary to the Constitution of the United States, and therefore null and void.

In accordance with this opinion, judgments and decrees will be rendered in these cases as follows:

1. In the action against the comptroller to recover the taxes paid under protest, or illegally exacted, the demurrer will be overruled and judgment rendered for the plaintiff for such amount as may be agreed upon or otherwise ascertained.

2. In the second case, a decree will be rendered finding the equity of the cause with the complainant, and granting the relief prayed, enjoining the several county authorities from proceeding further in the collection of the tax.

3. In the third case, the bill of the State will be dismissed for want of equity.

NOTE.—The proper mode of taxing sleeping car, telegraph, telephone and railroad companies, is as yet an unsettled question, different States having adopted entirely different modes of accomplishing the end in view.

The effect of Judge Matthews opinion in the case above reported is that sleeping car companies can only be taxed in each State upon the number of cars actually domiciled in that State, and engaged exclusively in transporting passengers from one point to another within the State; and that all cars engaged in inter-State commerce are *ipso facto* exempt from taxation altogether, unless it be that they are taxable at the domicile of the company upon their value as other property, though as to this point the opinion is silent. The same reasoning would equally apply to all passenger and freight cars engaged in inter-State commerce, and the States should be restricted in the taxation of these, to such as are domiciled within their respective borders, and engaged exclusively in local transportation. Such a position, as to the taxation of railroad property, has never been seriously contended for. To avoid this conclusion, however, the courts have uniformly held that the rolling stock of railroad companies has no *situs* of its own, and that its value may be distributed over the entire line of the road, for the purposes of taxation, even though they are engaged in inter-State commerce.

The constitutionality or unconstitutionaly of a tax is to be determined, not by the form of the tax, or the agency through which it is collected, but by the subject upon which the burden is laid.[1] And the Supreme Court of the United States has uniformly adhered to the distinction, that while a State tax would be levied upon the instruments of commerce such as a stage coach, railroad car, canal or steamboat, it can not be levied upon commerce itself. And while the tax upon the instruments of commerce may necessarily tend to increase the cost of transportation, still it is not a tax upon transportation or commerce, and as Mr. Justice Strong said, in delivering the opinion of the court in Reading R. Co. v. Pennsylvania,[2] where this distinction was drawn, "it has never been seriously doubted that such a tax may be laid."

Judge Matthews distinguishes the sleeping-car case from those of Osborne v. Mobile,[3] and Wiggins Ferry Co. v. East St. Louis,[4] upon the ground that in the former case "the subject of the tax was not the act of transportation itself, but a general business carried on within the State by a resident citizen thereof, which involved the making of contracts for transportation beyond the limits of the State;" and in the latter case "that the levying of a license fee, upon vessels or other water craft by the State within which the property subject to the taxation has its *situs*, is not a regulation of commerce, although the property is employed in foreign or inter-State commerce." The conclusion, therefore, would seem to be, that only the State of Kentucky, where the Pullman Southern Car Company has its domicile, can tax its cars, "a license fee, although employed in foreign, or inter-state commerce."

In Telegraph Co. v. Texas[5] the court says: "The Western Union Telegraph Co. having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and inter-state commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State or sent by public officers on the business of the United States." The court held that the specific tax on each message sent out of the State could not be sustained. Since the rendition of this opinion, which is not referred to by the distinguished judge, the Western Union Telegraph Company and all others, have regularly paid in many of the States "a privilege tax" in addition to the regular tax upon their property of a fixed amount "for each officer or station within the State." The distinction between this "privilege tax" upon the Telegraph Company, "for each officer or station within the State," although an admitted instrument of foreign and inter-state commerce, and the "privilege tax" on "each car run or used within the State," also engaged in foreign and inter-state commerce, is not so readily perceived.

While the court in Osborne v. Mobile,[6] said: "It is as important to have the rightful powers of the State,

1 State Freight Tax Cases, 15 Wall. 272; Bank of Commerce v. New York City, 2 Black 620.
2 15 Wall. 232.
3 16 Wall. 479.
4 107 U. S. 365.
5 105 U. S. 464.
6 16 Wall. 481.

in respect to taxation unimpaired, as to maintain the powers of the Federal Government in their integrity," it would seem from the opinion in the reported case, that there is at least one business carried on within the State receiving the benefit and protection of the laws of the State, but over which she has no control, and from which no revenue can be derived. The property itself can not be taxed, because neither it nor its owner is domiciled within the State, and unless the business in which the property is used can be taxed, it necessarily escapes taxation altogether. For such an anomaly the law must and will provide some remedy.

* * *

WILL — CONSTRUCTION — ABSOLUTE DEVISE WITH LIMITATION OVER.

JOHN v. BRADBURY.

Supreme Court of Indiana, June 19, 1884.

A will giving the testator's widow all his estate "to sell and dispose of as she may see fit for her own comfort and convenience," and giving her power to dispose of it in fee simple "if her necessities require it," and giving what remains at her death to his two children, makes a valid limitation over to the children, the widow taking only a life estate, with power to sell, "for her comfort."

Appeal from Wayne Circuit Court.

HAMMOND, J., delivered the opinion of the Court:

The following facts are gathered from the pleadings in this case: On January 11, 1872, Noble Newport executed his will as follows:

I, Noble Newport, of the County of Wayne and the State of Indiana, do make and publish this, my last will and testament, in form following to-wit:

Item 1st. I give and beqneath to my wife, Mary C. Newport, my property both personal and real, to hold and possess, sell, use or dispose of as she may see fit, for her own comfort and convenience; and hereby empower her to sell what realty I may be in possession of at my death, and convey the same by deed in fee simple, if her necessities or comforts require it.

Item 2d. The residue of my property or monies, if any should be left after her death, and full payment of her funeral expenses, be equally divided between my two (2) children, Joseph W. Newport and Amanda Wright. And I hereby constitute and appoint my said wife, Mary C. Newport, my sole executor without bond or security being required. In testimony thereof I have hereunto signed my name and affixed seal this 11th day of January, 1872.

The testator died in 1873, owning real estate and personal property of the value of $4000, leaving surviving him his widow, said Mary C. Newport, and two children, said Joseph Newport and Amanda Wright. These children were by a former marriage. The widow was the testator's second wife and by her he had no children. After his death, the widow procured the probate of his will, and without taking out letters of administration, entered into the possession of the decedent's property, and occupied, used and enjoyed it the same as her own, during her life.

She died in 1882, leaving a will in which she devised and bequeathed her property to certain of her relatives and friends. After her death the appellant took out letters of administration upon the estate of said Noble Newport and took possession of six promissory notes payable to said Mary C. Newport, which she had received from loans of money derived from the estate of her deceased husband. The appellant as such administrator, with the proceeds of these notes, paid the funeral expenses of said Mary C., settled the estate of said Noble, and made distribution of the balance to said Joseph W. Newport and Amanda Wright. The appellee as the administrator with the will annexed of said Mary C., brought his action against the appellant to recover the value and amount of said notes.

An answer was filed by the appellant in five paragraphs; the first of which was the general denial, afterwards withdrawn, and to each of the others of which, the appellee's demurrers for want of facts were sustained. The appellant declining to amend, judgment was rendered against him in favor of the appellee for $1900. The question presented by the ruling upon the demurrers to the special paragraphs of answer, is as to the quantity of the estate that was devised to Mary C. Newport by the will of her husband. Her administrator the appellee, claims that the will gave her, absolutely, the whole estate, leaving no remainder to go, at her death, to the said children of Noble Newport.

The appellant claims upon the other hand, that the will gave the widow only a life estate with the power of disposing of it, absolutely, so far as was necessary for her comfort and convenience, and that the residue of the property undisposed of at her death and after payment of her funeral expenses, went to the children of decedent named in the second clause of the will.

We are of the opinion that the appellant's construction of the will must prevail. A will must be construed so as to render it possible, every part of it effective and in such construction, the intention of the testator must govern in all cases where effect can be given to it without violating the rules of law. Lutz v. Lutz, 2 Blkf., 72; Kelly v. Stinson, 8 Blkf., 387; Jackson v. Hoover, 26 Ind., 511. An "heir is not to be disinherited without an express devise or necessary implication; such implication importing not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed." 3 Jar. Wills, 704. "All parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail. 3 Jar. Wills, 705. "The clause in a will which is posterior in local position must prevail, the subsequent words being considered to denote a subsequent intention." Evans v. Hud-

son, 6 Ind., p. 293; Holdefer v. Teifel, 51 Ind., 343; Critchell v. Brown, 72 Ind., 539. In Sweet v. Chase, 2 N. Y. 73, it is said: "It frequently happens that the effect of one clause in a will is qualified by another."

The first clause of a decedent's will disconnected from the second, would give the whole of his estate to his widow. But the first clause must be construed with the second; and thus read, the testators intention becomes plain that he designed to give his widow only a life estate with power to dispose of the property absolutely, for her own comfort and convenience leaving such portion as might be undisposed of at her death and after payment of her funeral expenses, to his children.

It could not have been the intention of the testator, that the undisposed of property at her death devised by his will, should go to her heirs or devisees, strangers to his blood to the exclusion of his own children. The construction we give the will is quite fully sustained by the following cases: Baker v. Riley, 16 Ind. 479; Johnson v. Battelle, 125 Mass., 453; Burleigh v. Clough, 52 N. H., 267; s. c., 13 Am. Rep. 23; Pierce v. Ridley, 1 Baxt. (Tenn.), 145; s. c., 25 Am. Rep., 769; Urich's Appeal, 86 Penn. St., 386; s. c., 72 Am. Rep., 707; Trustees, etc. v. Theological Seminary, etc., 16 N. Y., 86; Tenny v. Wiggins, 47 N. Y., 512.

We think the court erred in sustaining the demurrers to the appellant's special paragraphs of answer.

The judgment is reversed at appellee's costs with instruction to overrule said demurrers and for further proceedings in accordance with this opinion.

NOTE.—The decision in the principal case can be justified only on the theory that the testator gave his widow only a life estate, with a contingent right to demand the appropriation of some of the principal to her demands. If the testator gave her an estate in fee simple, the way to indorse the decision is not clear. "It has often been said and held that a devise to A in fee, but if A dies intestate without having disposed of the land by deed or will, then over to B is bad. It is not at first easy to say why this should be so, the owner of the land has full power of alienation, either by deed or will. It rests indeed with him to say whether the gift over shall take effect, but that is the case, with many executory devises. A devise may be made to A with a gift over, unless at his death he has been married, or has been called to the bar, or has gone to Rome, or has given $100 to B, and no one will question that the gift over is good, although it may rest exclusively within A's control whether the event, which is to prevent the gift over, shall take place or not. * * * A gift over of what is left undisposed of by the first taker, either in his lifetime or by his will, was early considered in these cases. Where the gift was of a sum of money or of a residue, such gifts were held bad, and for a good reason—for uncertainty, and the difficulty, if not impossibility, of determining the subject matter of the gift over. That was the reason which was given in the first cases."[1] The intention "must fail on account of its uncertainty."[2] The doctrine in such cases is now well settled.[3] "It is a rule that, where a money fund is given to a person absolutely, a condition can not be annexed to the gift that so much as he shall not dispose of shall go over to another person. Apart from any supposed incongruity, a notion which savors of metaphysical refinement, rather than of anything substantial, one reason which may be assigned in support of the expediency of this rule is that in many cases, it might be very difficult and even impossible to ascertain whether any part of the fund remained undisposed of or not, since if the person to whom the absolute interest is given left any personalty, it might be wholly uncertain whether it was part of the precise fund, which was the subject of the condition or not. Another reason may be that it would be contrary to the well being of the party absolutely entitled to lead him profusely to spend all that was given him, which in many cases, might be all that he had in the world."[4] The latter objection, alone, applies to attempts to encumber devises of real estate with such limitations over. But for that reason, if for no other, a devise over on the failure of the devisee in fee simple, to dispose of the same either by will or during his lifetime, or during his lifetime only, is void as repugnant to the estate created.[5] As said by Chancellor Kent in one case,[6] "we lay it down as an incontestable rule, that where an estate is given to a person generally or indefinitely, with a power of disposition it carries the fee. And the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain express words, and annexes to it a power of disposal." It is fully settled by authority, that if the first taker has the power by the terms of the will, to dispose of the property, he must be considered the absolute owner, and any limitation over is void for repugnancy." Where, by the terms of the will, the first devisee is given the absolute right to dispose of the property, a limitation over of so much as he may leave undisposed of at his death, is void for repugnancy."[7] And Beck, J., in delivering the opinion of the Iowa Supreme Court in a recent case:[8] "It will be observed that the will devises to the testator's widow the real estate in fee simple absolute,

[1] Gray on Restraints on Alienation, 34, citing Lightburne v. Gill, 3 B. P. C. (Toml. Ed.) 250 (1764).

[2] Per Sir William Grant M. R. in Bull v. Kingston, 1 Mer. 314 (1816).

[3] Ross v. Ross, 1 J. & W. 154; Cuthbert v. Purrier, Jac. 415; Phillips v. Eastwood, Lloyd & G. temp. Sugd. 270, 297, 298; Green v. Harvey, 1 Hare, 428.

[4] Per Lord Truro C., Watkins v. Williams, 3 Mac. & G., 622, 629; *In re* Yalden 1 DeG. M. & G. 53; *In re* Mortlock's Trust, 3 K. & J. 456; Barton v. Barton, Id. 512; Bares v. Goslett, 27 L. J. Ch. 249; Henderson v. Cross, 29 Beav. 216; Wealle v. Ollive, 32 Beav. 421; Perry v. Merritt, L. R. 18 Eq. 152; *In re* Wilcock's Settlement, L. R., 1 Ch. Div. 229.

[5] Gulliver v. Vaux, 8 DeG. M. & G. 167 (1746); Holmes v. Godson, Id. 152; Shaw v. Ford, 7 Ch. D... 69, 674; Annin v. Vandoren, 1 McCart. 135; McKenzie's Appeal, 41 Conn. 607; Reddick v. Coborn, 4 Rand, 547; Smith v. Bell, Mart. & Y. 302; Sevier v. Brown. 2 Swan. 112; Attorney-General v. Hall Fitzg. 314 (1731); W. Kel. 13; 2 Eq. Cas. Abr. 293 pl. 21; Jackson v. Bull, 10 Johns. 19.

[6] Jackson v. Robinson, 16 Johns. (N. Y.) 587.

[7] Flinn v. Davis, 18 Ala. 132; Jauretche v. Proctor, 48 Pa. St. 467; McWilliams v. Nesely, 2 S. & R. (Pa.) 513; Schumacher v. Negus, 1 Denio (N. Y.) 448; Jackson v. De Long, 13 Johns. amesdale v. Ramesdale, 21 Me. 295; Harris v. Knapp. 21 Pick. 416; Pickey v. Langdon, 27 Me. 412; Whale v. Whale, 21 Vt. 250; Hale v. Morris, 100 Mass. 468; Ide v. Ide, 5 Mass. 500; Jackson v. Robinson, 15 Johns. 169; McDonald v. Waldgrove, 1 Sandf. Ch. 274; Armstrong v. Kent, 1 Zabr. 509, Nelson v. Doe, 4 Leigh, 408; compare Hubbard v. Rawson, 4 Gray, 242; Andrews v. Roye, 12 Rich. 536.

[8] Alden v. Johnson, 18 N. W. Rep. 1884.

which is shown by his pleadings to be all of his lands, and also bequeathed to her all of the personal property of which he died possessed. After making this disposition of the property, it directs that any portion which may remain at the death of the widow, shall go to the surviving children of the testator and his widow, and if there be none, it shall in that case be taken by his children of a former marriage. The will gives the absolute title of the property to the widow with a subsequent direction, as to the disposition of whatever part may remain at her death. The words of the will directing the disposition of the property remaining at the death of the widow, if regarded as simply precatory in character, can not, of course, affect the absolute title she takes under the instrument; and if they be regarded as imposing a condition or limitation to the effect, that she shall take less than the unqualified and absolute interest and title in the property, they are repugnant to prior language in the instrument devising to her the fee simple title in the land, and an unqualified right to the personal property, and are therefore void.[9] Under this rule of the law, the widow acquires by the terms of the will, all the property of the testator, without limitation or conditions." Where "the property is expressly or by necessary implication to be spent by the primary legatee at his pleasure, a further limitation is clearly hostile to the nature and the intention of the gift.[10]

Where "A" devised his personal and real property to his son "P," and in his will said * * * "and further it is my will that if my son 'P' shall die and leave no heirs, what estate he shall leave to be equally divided between 'I' and 'N', to them and their heirs for ever," it was held "that the devise over to 'I' and 'N' was void, as being inconsistent with the absolute unqualified interest of the devisee."[11] And a devise over on the devisee dying intestate is equally bad.[12] The whole question involved in every case is, did the devisee take a fee simple estate if the subject matter be real property, or the absolute interest if personalty.

As said by Washburn[13] "no remainder can be limited after a fee, for when a fee has once been created there can be nothing left by way of remainder to give away. Nor does it make any difference that this fee is a qualified one, for so long as it exists, it is deemed to be definite in its duration, and no remainder can be expectant upon it. It has accordingly been held, that if an estate is given to one with a full and absolute power of control, and disposal there can properly be no remainder after his estate, though this was in terms a contingent one." And again he says[14] "There is one class of cases where, though there be a devise in form, there is a limitation over, after a preceding estate it may be inoperative and void, by reason of the first estate being constructively an absolute fee. The question in such cases grows out of the character of the first estate, that is: whether it is determinable or not. The test usually applied in such cases is: whether or not the first taker has the right and power of absolute disposal of the estate? If he has, it is construed to be an nqualified gift to him and the devise over will be void. Thus, a devise of certain lands to one's son, "A," and his heirs and assigns forever, with this clause: "It is my will that if my son "A" shall die and leave no lawful heirs what estate he shall leave, to be equally divided between "J" and "N," to them and their heirs forever." In terms this is on executory devise to "J" and "N," expectant upon "A's" dying without lawful heirs. But as the latter clause limits this to only what "A" "shall leave," it implies that he may if he please, use or dispose of the whole, and therefore what he leaves, if anything, is his own, and not something in which the testator had a visionary intent. "What is meant by the absolute power of disposition which defeats an executory devise can be ascertained by referring to the reason upon which the principle is founded. One of the distinguishing properties of an executory devise is its indistructibility, and its total exemption from the power and control of the first taker. As a consequence of this construction of executory devises when the testator's intention, to place the limitation over under the power of disposition of the first taker appears the executory devise is void."[15]

In Morford v. Diffenbacker,[16] the Supreme Court of Michigan came to the same conclusion as the court in the principal case except that in that case the devise was expressly for life with power to dispose of absolutely, if necessary for her support.

[9] See Rona v. Meier, 47 Iowa, 607 and cases cited: Bankert v. Jacoby, 36 Iowa, 273; Williams v. Allison, 33 Iowa, 278. As to the effect of such a condition in a deed, see Case v. Devere, 15 N. W. Rep. 265.

[10] Campbell v. Beaumont, 91 N. Y. 465.

[11] Ide v. Ide, 5 Mass. 500.

[12] Bowen v. Dean, 110 Mass. 439; May v. Jaynes, 20 Gratt, (Va.) 695 (1871); Gifford v. Choate, 100 Mass. 343; Perry v. Cross, 132 Mass. 454; Moore v. Sanders, 1 So. Car. 440; Kasker's Appeal, 60 Pa. St. 141; But see Doe v. Glover, 1 C. B. 448.

[13] 2 Real Prop. (3d ed.) sec. 11 (side paging 228).

[14] Id. sec. 12, (side paging 374).

[15] McLee v. Morris, 34 Ala. 349, 369.

[16] 20 N. W. Rep. 600.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION FOR INJURY FROM BITE OF DOG—OWNERSHIP OF DOG—EVIDENCE—LIABILITY OF OWNER.

In an action to recover damages for personal injury caused by being bitten by a dog, it is not error to instruct the jury that, if the defendant had the dog in his possession, and was harboring him on his premises as owners usually do with their dogs, then he was the owner within the meaning of the statute; but if the dog was casually on his premises, and not being harbored by defendant as owners usually harbor their dogs, then he was not the owner; and that, in determining how this was at the time of the alleged attack, they would consider defendant's former treatment of the dog, his declarations concerning him, and the habit of the dog as to staying at defendant's place. *O'Hara v. Miller*, S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 760.

2. APPEAL—ERROR IN TIME AND PLACE BY FAULT OF APPELLANT.

When, on appellant's own motion or suggestion, an appeal is made returnable at a time and place different from those required by the provisions of a mandatory law, and when the order of the judge granting the appeal shows that he merely adopted the suggestion of appellant by granting the appeal "as prayed for," the error is imputable to the fault of appellant, and under the settled jurisprudence of the State the appeal must be dismissed. *State v. Jenkins*, S. C. Louisiana, Oct. 25, 1884.

3. CHATTEL MORTGAGE—DESCRIPTION OF PROPERTY—INDEFINITENESS.

When the property intended to be conveyed by a chattel mortgage is described as "forty fat hogs, four brood sows, and twenty five pigs," the description is too indefinite, and the record of the mortgage imparts no notice of the transfer of the property to an attaching creditor of the mortgagor. *Everett v. Brown*, S. C. Iowa, Oct. 8, 1884; 20 N. W. Rep. 743.

4. CONTRACT—PATENT—DEFENCE OF INVALIDITY OF PATENT.

Plaintiff assigned to defendant a supposed invention. Defendant applied for a patent, but the application was rejected for want of novelty, whereupon the solicitor amended it to include something not before contained, and a patent was granted, under which defendant manufactured. *Held*, that the invalidity of the patent was not a good answer to the action of the plaintiff upon a contract to pay for the assignment. *Milligan v. Lalance etc. Co.* U. S. C. C. S. D. N. Y. Aug. 29, 1884.

5. CORPORATIONS—FOREIGN—RECOVERY OF INSURANCE PREMIUMS.

A foreign insurance company may recover in an action upon a premium note given as the consideration for a contract of insurance made in this State, although such company have not complied with the laws of this State in regard to insurance. *Union Ins. Co. v. Smart*, S. C. N. H. Reporter's Advance Sheets.

6. CORPORATION—LIABILITY OF STOCKHOLDERS—TRANSFER OF STOCK—UNPAID BALANCE.

The Burlington, Cedar Rapids & Minnesota Railway Company, being indebted to a construction company on a contract under which it had constructed the road, as a compromise of the claim, transferred to the construction company certain shares of stock, at 20 per cent. of the face value of the stock, in full settlement of the claim, and the shares were distributed among the members of the construction company. *Held*, that the members of the construction company could be held liable as stockholders of the railroad company for the unpaid balance on the stock so received. *Jackson v. Traer*, S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 764.

7. COURTS—INTEREST OF JUDGE IN QUESTION—SUBPŒNA TO PRODUCE DOCUMENT.

The mere fact that a justice of the peace is subpœnaed to produce a charter which was supposed to show that a place was a market town, his offering the document having no interest whatever in the matter, does not disqualify him from sitting and adjudicating upon the trial. *Reg. v. Tooke*, Eng. H. Ct. Q. B. Div. April 22, 1884; 48 J. P. 661.

8. COVENANTS—WARRANTY—BREACH OF.

If a vendor sells land with special warranty of title, and at the time it has been rented for a year by his agent without his knowledge or express directions, he believes when the deed is made that the farm is unoccupied, and the vendee cannot get possession for nearly a year, the tenant refusing to vacate till his term is out, this constitutes a breach of warranty. *Moreland v. Metz*, S. C. App. W. Va. Apr, 19, 1884; 24 W. Va. 119.

9. CRIMINAL PRACTICE—REFUSAL OF CONTINUANCE FAILURE OF WITNESS TO APPEAR—EXCUSE.

Where a motion was made for a continuance on account of the absence of a witness, by whom the accused expected to prove that he was hired to haul the cotton which he was charged with having stolen, and the person who subpœnaed the witness testified that the latter stated that she knew nothing about this matter, there was no abuse of discretion in refusing a continuance. *Mosley v. State*, S. C., Ga. Oct. 21, 1884; Judge's Head Notes.

10. DOWER—DEFEASIBLE FEE-SIMPLE.

A widow of one to whom an estate in fee simple is given, with an executory devise to the heirs of the devisee's sisters on his death without issue, is entitled to dower in the estate although the event happened in which the limitation over was to take effect. *Tomlinson v. Nickell*, S. C. App. W. Va.; Apr. 19, 1884; 24 W. Va. 148.

11. EQUITY—MANDAMUS—PAYMENT OF JUDGMENT.

Where a bond-holder entitled to receive money out of a certain municipal fund from which payment is refused, and which he fears may be diverted, is not entitled to an injunction forbidding the use of the money for any purpose other than that to which it should be applied, for if there are funds in the treasury applicable to his debt he may compel payment to himself by mandamus, and if the municipal authorities do not set apart funds or levy a tax for the purpose as required by law mandamus will also lie to compel such setting apart or levy. *Hausmeister v. Porter*. U. S. C. C. D. Cal., Aug. 29, 1884; 18 Rep. 514.

12. ESTOPPEL—CORPORATION—DENIAL OF CORPORATE EXISTENCE.

When a body assumes to be a corporation and acts under a particular name, a third party, dealing with it under such assumed name, is estopped to deny its corporate existence, except where there are no facts which make it legally unjust to forbid its denial. *Estey Mfg. Co. v. Runnels*, S. C. Iowa, Oct. 15, 1884; 20 N. W. Rep. 823.

13. ESTOPPEL—JUDGMENT AGAINST ONE JOINT PROMISOR.

An unsatisfied judgment against one joint promissor is no bar to a subsequent suit against the remaining co-promissors, who at the time of the recovery of the judgment were without the jurisdiction, so that no service could be made upon them. *Tibbets v. Shapleigh*, S. C., N. H.; Reporter's Advance Sheets.

14. ESTOPPEL—RELEASE OF DOWER—DETERMINATION OF ESTATE—EFFECT OF RELEASE.

The release by a wife of her inchoate right to dower in the defeasible fee simple of her husband, does not give the grantee any right to the dower she afterwards obtains on the determination of such fee simple, and the consequent defeat of the

grant. *Tomlinson v. Nickell*, S. C., App. W. Va., April 19, 1884; 24 W. Va. 148.

15. EVIDENCE — HOMICIDE — MALICE—THREATS BY ACCUSED.
Evidence to show that the accused had made efforts to cause the deceased to leave the country, in reference to a criminal prosecution instituted against him by the latter, who is the material witness in such case, and that in that connection he had made threats against the deceased, is admissible, as it tends to show elements of malice in the homicide. *State v. Birdwell*, S. C. La., October 25, 1884.

16. EVIDENCE — LARCENY — SUFFICIENCY OF CIRCUMSTANTIAL PROOF.
Under a charge of larceny, the evidence showed that the stolen cotton was traced to the vicinity of the defendant's residence, and was hidden in a pine thicket near by, that the wagon and human tracks which led to the point where the cotton was deposited, led also from that place to the defendant's house; that one of the foot-prints corresponded with his tracks, which had some marked peculiarities, and the impression made by the wheels of the wagon strongly resembled those made by the wheels of one of the wagons found where the defendant lived; and that no other person dwelling there had so large and peculiar a foot as he. In his statement he failed to explain these facts. *Held*, that a conviction was warranted by the evidence. *Bryant v. State*, S. C. Ga. October 21, 1884; Judge's Head Notes.

17. EVIDENCE OF DEATH—GENERAL REPUTE.
The testimony of the grantee in a deed claimed to have been executed by the widow and heirs of a party who was the former owner of the property, that he had visited the neighborhood where the party resided, and that it was generally reputed in such neighborhood that such party was deceased at the time when such deed was executed, and that the grantors were his widow and heirs, is mere hearsay evidence, and not admissible. *Ross v. Loomis*, S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 749.

18. EVIDENCE—PAROL TO CONTRADICT BILL OF SALE.
Parol evidence is not admissible to show that at the time a bill of sale of an interest in a crop of wheat was made, it was understood that if the weight exceeded a certain quantity the vendor should be entitled to the value thereof. *Brewster v. Potruff*, S. C. Mich. Oct. 15, 1884; 20 N. W. Rep. 823.

19. EVIDENCE—PROVING PRIOR STATEMENTS OF WITNESS—AS AFFECTING HIS CREDIBILITY.
If a witness testifies to a given thing as a fact having a bearing on the issue, and it can be shown that he had uttered words or done acts which he would not have uttered or done if his sworn statement were true, he may be interrogated thereto, and if he denies such matter, the same may be proved, not as a fact bearing upon the issue, but as a fact bearing upon the credibility of the witness. *Chicago & A. R. Co. v. Pennell*, S. C. Ill. May 19, 1884; Reporter's Head Notes.

20. GARNISHMENT—JUDGMENT DUE TO TWO.
A judgment creditor can not under any circumstances, by a garnishee order attach a debt due to the judgment debtor and another jointly in order to satisfy a judgment obtained by him against the judgment debtor alone. *Macdonald v. Tacquah, etc. Co.*, Eng. Ct. App. May 1, 1884; 51 L. T. N. S. 210.

21. HOMESTEAD—WAIVER OF RIGHT OF INSANE WIDOW BY GUARDIAN.
The guardian of an insane widow has no power to waive the homestead rights of his ward. Such rights are personal. *Ratcliff v. Davis*, S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 763.

22. INSURANCE—FIRE—ASSIGNMENT OF POLICY—FALSE REPRESENTATIONS OF INSURED.
Where insured property has been purchased by a party, and an assignment of the policy of insurance made to him, with the consent of the insurance company, in an action by him to recover for a loss, the company can not prove the false representations of the party who obtained the policy as to incumbrance on the property insured. *Ellis v. Council etc. Ins. Co.* S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 782.

23. INSURANCE—FIRE—CONSTRUCTION OF POLICY—TIME OF BRINGING SUIT—PROOF OF LOSS.
When a policy of fire insurance provides that if an action is not brought within six months after a loss it can not be maintained, and it is further provided that the company will pay any loss that may occur, 60 days after due notice and proofs of the same shall have been made by the assured and received at the home office, the limitation created by the first provision will not begin to run until the expiration of 60 days from the time the proofs of loss are furnished. *Ellis v. Council etc. Ins. Co.*, S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 782.

24. INSURANCE—LIFE—WAIVER OF VIOLATION BY ACCEPTANCES OF PROOFS OF DEATH.
If, after full knowledge of the fact that the insured had gone to the torrid zone in violation of one of the conditions of his policy, and that there was a discrepancy in regard to his age, it so appearing from the application for the policy and the proofs of death, the insuring company expressed satisfaction with the proofs, and promised payment, this amounted to a waiver of the forfeiture claimed to result from a failure to comply with such conditions. *Cotton, etc. L. Ins. Co. v. Edwards*, S. C., Ga., Oct. 18, 1884; Judge's Head Notes.

25. JURY TRIAL—BIAS OF JUROR—GOSSIP.
In a criminal prosecution a juror is not incompetent because it is shown that on the day before the trial he declared in a public store that he intended to convict every person tried before him as a juror, and when it is shown that on his *voir dire* the juror showed that he had no bias or prejudice in the case. Courts will not consider gossip in determining the legal qualifications of jurors. *State v. Birdwell*, S. C., La. Oct. 25, 1884.

26. MASTER AND SERVANT—CONDUCTOR ASSUMING CONTROL OF ENGINE—INJURY TO BRAKEMAN.
The engineer and fireman in charge of the locomotive of a railroad train having temporarily left their respective posts, the conductor, who it was alleged was incompetent for the purpose, undertook to take the place of the engineer, and ordered a brakeman to make a coupling, and while he was obeying this order, and in consequence of the unskillfullness of the conductor, the brakeman was injured. *Held*, that he was not entitled to recover, in an action against the railroad for such injury. *Rodman v. Mich. Cent. R. Co*, S. C. Mich. Oct. 15, 1884; 20 N. W. Rep. 788.

27. MORTGAGE—INCONSISTENCY IN DESCRIPTION EXPLAINED AND CORRECTED BY PAROL.

When in an act of mortgage the property mortgaged is first described by its legal subdivisions, and these subdivisions are then declared to compose a certain plantation, giving the name thereof and otherwise sufficiently describing it apart from the subdivisions mentioned, *held* that the mortgage rested on the plantation, and that parol evidence was admissible to show that the description by the legal subdivision was erroneous and that said numbers did not in whole or in part compose the plantation. *Dickson v. Dickson*, S. C. La., Oct. 25, 1884.

28. MUNICIPAL CORPORATION—ADVERSE OCCUPATION OF A STREET.

Adverse possession of a city alley for the statutory period gives title to the occupant. *City of Ft. Smith v. McKibbin*, S. C. Ark. 30 Alb. L. J. 349.

29. NEGLIGENCE—CONTRIBUTORY—INJURY TO PASSENGER—GOING ON PLATFORM OF MOVING TRAIN.

A passenger on a train that reached his distination about midnight failed to get off because he was asleep, and after the train had started a brakeman asked him if he did not intend to get off at that station, and that if he did he "had better be getting off quick," upon which he went out on the platform of the car and stepped down on the second or third step, to look out for the depot, as he claimed, when the train gave a sudden jerk and he was thrown to the ground and injured. *Held*, that he was guilty of contributory negligeuce, and not entitled to recover damages. *Lindsey v. C., R. I. & P. R. Co.*, S. C. Iowa, Oct. 7, 1884; 20 N. W. Rep. 737.

30. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—NON-OBSERVANCE OF WARNING TO KEEP OFF TRACKS.

Where the servants of two railroad companies occupying the same depot grounds with their respective tracks, are required, in the performance of their duties, to pass over the tracks of both companies, a sign erected upon the grounds warning all persons to keep off the tracks, and informing them if they went upon them it would be at their peril, would not be regarded as applying to the servants of either company. *Ill. Cent. R. Co. v. Frelka*, S. C. Ill. May 19, 1884; Reporter's Head Notes.

31. NEW TRIAL—TRIAL FOR HOMICIDE—SEPARATION OF JURY—CONVICTION OF MANSLAUGHTER.

Where a man on trial for murder is convicted of manslaughter only, he is obliged to prove that improper influence operated on the mind of a juror who separated during the trial from his fellow-jurors. *Moss v. Commonwealth*, S. C. Pa. Oct. 20, 1884: 15 Pitts. L. J. 107.

QUERIES AND ANSWERS.

QUERIES ANSWERED.

Query 47. [19 Cent. L. J. 338.] What is the full legal effect of the words "without recourse" when forming part of the endorsement of a negotiable note? Does it simply negative the otherwise implied legal obligations of the endorser, or does it relieve the endorser from all liability connected with the non-payment of the note? Examples: A sells B a horse for a hundred dollars. B gives in payment a note he holds against C, endorsing it "without recourse" Suppose the note cannot be collected from C, can A maintain an action against B for the price of the horse? 2nd. Suppose the note then endorsed is taken as absolute payment, but upon verbal warranty of B that C the maker of the note at the time of the endorsement was solvent. Suppose it turns out that C at the time of endorsement was insolvent and the note could not be collected. Can A maintain suit on his verbal warranty against B, or is the verbal warranty inconsistent with the written endorsement?

W. C. F.

Answer. An indorser of a bill or note engages (1) that the bill or note will be accepted or paid, according to its purport: (2) that it is in every respect genuine; (3) that it is the valid instrument it purports to be; (4) that the ostensible parties are competent; (5) and (6), that he has a lawful title to it, and the right to indorse it.

(1) An indorser "without recourse" specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that is what it purports to be, the valid obligation of those whose names are upon it. Therefore the holder may recover against the indorser "without recourse, (1) if any of the prior signatures were not genuine; (2) if the note was invalid between the original parties, because of the want, or illegality of, the consideration; or (3) if any prior party was incompetent; or (4) if the indorser was without title. Therefore the legal effect of an indorsement "without recourse," is to relieve an indorser of all the legal liabilities as an indorser, except the four mentioned above. See 1 Daniel on Negotiable Instruments, pp. 531-532.

(2) If A accepted in absolute payment, a note of C for B's debt of $100, B indorsing it "without recourse," A then has no right of action against B in the event he fails to recover from C, provided the failure results from none of the four obligations mentioned above as attaching to an indorser "without recourse."

A debtor may transfer to his creditor the note or bill unindorsed of a stranger, and this by the weight of authority is regarded as a satisfaction of the debt, and the dishonor or non-payment of the bill or note does not revive the debt. But if the debtor indorses the bill or note, the view is generally adopted that there is a presumption of conditional payment only, and upon non-payment the creditor may sue for the amount of the consideration. But an indorsement "without recourse" is a declaration by the debtor to the creditor "that he takes the notes at his peril," and creditor can't recover of the debtor on the original debt, upon the non-payment of the note or bill. See 2 Daniel on Neg. Ints. p. 266, 267, secs. 1264, 1265; Monroe v. Huff, 5 Den. 369; Byrd v. Hitchcock, 20 Johns. 76; Soffe v. Gallagher, 3 E. D. Smith, 507; Shriner v. Keller, 25 Penn. St. 61; 2 Am. Lead. Cas. 263; 2 Parsons N. & B. 159. But if B. represented to A that C was solvent at the time, when he knew to the contrary, it was a fraud upon A, and he may sue B for the original debt, but not on any verbal warranty. See 2 Daniel on Neg. Ints. p. 270, sec. 1269; Bridge v. Bachelder, 9 Allen, 394; Hawse v. Crowne, 1 R. & M. 414; Pierce v. Drake, 15 Johns. 475; Brown v. Montgomery, 20 N. Y. 287; Delaware Bank v. Jarvis, 20 N. Y. 266; Byles (Sharwood's Ed.) (157, 158) 278, 279 note; Story on Bills, sec. 225.

Atlanta, Ga. FULTON COLVILLE.

LEGAL MISCELLANY.

TO BE A LAWYER.

The luxury of pleasing others, enjoyed alike by actors, singers and lecturers, is shared by lawyers. They show it in looks, express it in words, and tell it in tones of speech that thrill and captivate hearers, and inspire the young with an early desire to be like such leaders. With this longing after greatness few believe in the hindrances to success, and most young men allow a free fancy to picture the future in gilded coloring. As thought crosses leagues and spans oceans in space, as soon and as easily as across the street, so the ambition leaps from youth to greatness, without the steps that lead upward on the rounds of fame's steep ladder.

Very few people consider the step by step process required in reaching success in law practice. It will not come by accident. It may not come by years of earnest labor. It will more likely come by tact and art, honesty and eloquence. Actors reach distinction by finding their forte and following it artfully, but they have a stage and play to enforce attention. Lawyers must wait like doctors for a first case, and may be, for a first half hundred. To get in the procession is a great advance for a young lawyer. Once in the line, the rest depends upon mettle, gift, accident or industry.

To be a lawyer requires the skill of a stair-builder the art of an engineer, the eye of an artist, the voice of an actor, and the genius of an experienced machinist; it is more; it is to be all these in one; it is not in a literal sense but comparatively speaking.

There is the run and the rise; the bearer and the hand rail, or as the builders say the "material to get out" the joints to make and the ascent to be made easy.

The machinist has no more intricate work than the the master of a great trial. The engineer needs no more care nor the artist more shading to bring out characters in the light of nature, nor does the actor need more power to compel conviction than every good lawyer should command.

In the light of this combination of quality is it a marvel that men succeed only seldom in the legal profession?

Is it not rather a high and noble calling that demands such diversity of talents and such tireless energy in fitting the mind and body for so great a part in life's business?

The lawyer of all men should know much of life, and much of human nature. He should be a novice in nothing, and wide-minded in all things. Not a genius in everything but ripe in broad knowledge and general experience. When he is this, if he fails it will be no fault of his own, and like Clay said of the presidency that he had "rather be right than president." One had better be fitted for a lawyer and never have the golden fame he desires than have ever so many trials and do his duty indifferently.

If I should give one rule of fitness it would be that innate feeling that you are born for the law, and if after reading the record of other men's struggles and triumphs you still feel undaunted and courageous, and possess a voice and body, and constitution for such a life of study and perplexity, then adhere to your convictions like the old martyrs did to their religion giving their whole life to the contest.

J. W. DONOVAN.

NOTES.

——A simple contract—Wager between two fools as to which is the greater.

——A Boston female school teacher has been fined for inhuman cruelty toward a male pupil. She kissed him with her spectacles on.

——"I'm not in politics this year, but I'll take the stump all the same," said a tramp, going down into the gutter for a half smoked cigar.

——"I heard the other day that Snifkins was engaged in criminal practice." "Is he a lawyer?" "No; but he is almost as bad. He was caught stealing a pair of boots."—*Ex.*

——Judge: "What sort of man, now, was it whom you saw commit the assault?" Constable: "Shure, yer honor, he was a small, onsignificant crathur—about your own size, yer honor!"

——A young fellow from Omaha has been sent to jail for hugging a Chicago girl. This is a poor specimen of justice. The act itself should be taken as *prima facie* evidence of insanity.—*Ex.*

——One of the clauses of the new French divorce law has been styled by the Parisians an act "for the protection of mothers-in-law." It provides as a ground for divorce by husband or wife "habitually insulting the relatives of the other."—*Ex.*

——The address of Thomas Wilson, Esq., read before the Minnesota State Bar Association, in April, 1884, on "encroachments of the Federal Judiciary" is an able one, and shows that its author well understood what he was handling. It is well worth reading.

——We have received from Will H. Scott, of 183 Mound St., Cincinnati, Ohio, a pamphlet called "Questions Submitted to the Graduating Classes of the Law School of Cincinnati College from 1879 80 to the Present Time." It is a good thing for students to "cram" with preparatory to slaughter at the bar examinations.

——A young law student in the southwest went to an old judge to be examined for admission to the bar. After a desultory conversation the judge said: "Well, young fellow, hang out your shingle and go ahead." "But you have not examined me." "Never mind," was the brilliant reply; "if you don't know no law, you won't get no practice, so you won't do harm nohow."

——Clark Bell, Esq., President of the New York Medico Legal Society, has forwarded us his paper on "Madness and Crime," read before the society at a recent day, and appearing in the next number of the *Medico-Legal Journal*, of which the learned writer is editor-in-chief. It is an able exposition, to the length he pretended to go, of the law of insanity, and his consideration of the McNaughten case and his liberal criticism make it a valuable paper.

——Mrs. Myra Clark Gaines, the noted litigant of New Orleans, is said to have met with her first failure in all her long litigious career, in the recent case of Gaines v. Miller, 111 U. S 395. Henry H. Denison, Esq., of St. Louis, was the one who was designated by fate to pluck from her wreath the coveted flower, and we trust that he will modestly carry it. It is something that he may remember with satisfaction and were it not for his modesty, we would have known it before we accidentally discovered it.

——A New York Dispatch says: In the Supreme Court in the case of Pardee against the New York Central Sleeping-car Company, for loss of money alleged to have occurred in one of their cars, Judge Vann has non-suited the plaintiff on the grounds that it was not shown that the company had been found guilty of any negligence, and that they were not common carriers, but merely furnished conveniences for sleeping, the railroad company being the carriers.

——A trial has just been concluded before the Court of Assize of the Seine, which is one of those cases in which French juries reduce the institution of trial by jury to the ridiculous. A man returning, after a fortnight's illness, to his mistress, finds she has consorted with another man. He stabs her with a file, strangles her with his pocket handkerchief, and, leaving her dead, endeavors to drown himself in the Seine. He does not succeed, and, a few days afterwards, gives himself up to the police. The jury has acquitted this heroic person on all counts.—*Irish Law Times.*

——At Salem, New Jersey, yesterday, Howard Sullivan, a boy of nineteen, was convicted of murder in the first degree solely upon his own confession of the commission of the deed. The prisoner confessed his crime to a Pinkerton detective who was locked in a cell with him, and whom he supposed to be a *bona fide* prisoner. The court ruled that the testimony of the detective was conclusive. This is the first case on record in New Jersey of the conviction of a murderer entirely by his own confession.—*Daily Law Record.*

——A Philadelphia coroner's jury proposed to punish a drug clerk because some strychnine pills, which he had not marked poison, were fatally swallowed; but a judge ordered his release. "The legislature could never have intended," said his honor, "that a prescription of a reputable physician, in a case of delicate treatment, in which one of the poisons named should be used in the proper quantity, should be sent by the druggist to the sick room of a nervous patient with the word 'poison' marked on the label. Such a law would be destructive of medical science, unreasonable, and against the spirit of sound legislation."

——For services extending through two months in settling an estate worth $32,000, three Milwaukee lawyers presented bills aggregating $25,000. When the bills were submitted to Judge Drummond for approval, he said: Gentlemen, you consider yourselves good lawyers. How much more are your services worth to your clients, than mine to the people? You have charged $25,000 for sixty days service. Could you not be content, each of you to take my pro rata for the same time? These charges are infamous. They are such as men who are scoundrels and thieves at heart would make. This charge of $15,000 is cut down to $1,500, those of $5,000 each to $500. Repeat such a piece of rapine in this court and I will disbar every one of you."

——Not many years after the war of the Revolution there was a jury trial in which the plaintiff's counsel supported his case by quoting the common law of England. There were two or three old soldiers on the jury, and the defendant's lawyer, a mere pettifogger, thought that an appeal to their ignorance and prejudices would be the most affective reply. "Gentlemen," said he, assuming the air of an indignant patriot, "how dare the counsel quote to you the common law of England. Some of you helped to give that country a good beating, and are you to be insulted by having its common law flung at you? Why didn't the counsel quote to you its best law? I tell you, gentlemen, that we Americans are worthy of having its uncommon law quoted to us." He won his case, as that jury would not be insulted by any common law.

——An English paper says: "A man wants a piece of his neighbor's land to improve the approaches to his house, but the owner objects to sell, except under conditions. In the meantime a public body acquires the land compulsorily, but does not want the whole of it, and sells the surplus portion to the original owner's neighbor, who turns it to his desired purpose, free of all restrictions. Has the involuntary seller any remedy against the second buyer? None whatever, says Mr. Justice Chitty, in deciding such a case at Camberwell, where the School Board had been the purchasers under compulsion. Good law, doubtless, but rather hard notwithstanding. The law calls this "*damnum absque injuria.*" The suffering party generally thinks the first syllable sufficient." This is not good law, and our statement is fully borne out by the recent case of Belcher, etc. Co. v. St. Louis etc. Co., 19 Cent. L. J. 74.

——In his studies, Rufus Choate kept pace with the colleges, and with modern thought as there illustrated. He used to buy the text-books of Harvard and Yale, beginning with the freshman year, and, in effect, graduating with the students. I once asked him why he did this. He said, "I don't like to have those young fellows come out of college crowing over me; they fresh and bright, I dull and rusty; we must habitually go back to the elements, first principles, and note new applications of them by those whose special business it is to teach." In the composition of Mr. Choate's nature, the prevailing element was sweetness. Bitterness was entirely left out. His spirit, like the action of his mind, was quick and easily aroused; but he could not carry anger, nor keep alive a feeling of resentment. He had no false pride of opinion, and could laugh at his own mistakes as readily as others. After witnessing in court, one day, with two or three others, the queer rulings of a certain judge, who had made himself somewhat conspicuous in his mode of conducting trials, one of them turned to him and said, "Let us see, did you not join in a petition to have this man appointed?" "Headed it," said Mr. Choate, with the quietest possible humor, and went on with his conversation.

——The following specimen of an examination for admission to the bar is told as illustrative of how things were done under the old system: Examiner. Do you smoke, sir? Candidate. I do, sir. E Have you a spare cigar? C. Yes, sir—(extending a Havana). E. Now, sir, what is the first duty of the lawyer? C. To collect fees. E. Right! What is the second? C. To increase the number of his clients. E. When does your position toward your client change? C. When making up a bill of costs. E. Explain! C. We then occupy the antagonistic position—I assume the character of plaintiff and he becomes defendant. E. A suit decided, how do you stand with the lawyer conducting the other side? C. Cheek by jowl. E. Enough, sir—you promise to be an ornament to the profession, and I wish you success. Now, are you aware of the duty you owe me? C. Perfectly. E. Describe the duty. C. It is to invite you to drink. E. But suppose I decline? C. (Scratching his head.) There is no instance of the kind on record in the books. I cannot answer that question. E. You are right; and the confidence with which you make the assertion shows that you have attentively read the law. We will go and take a drink and then I will sign your certificate.—*Ohio L. J.*